CLEMENT K CHIMUTI
versus
MEIZON PETROLIUM (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 22 February, 11, 12, 25, 26 March, 4 June 2024 & 11 March 2025

CIVIL TRIAL

A Muchadehama, for the plaintiff
T Chimusaru, for the defendant

MANZUNZU J

A. INTRODUCTION

The plaintiff sued the defendant essentially seeking an order, to confirm cancellation of an agreement between the parties, for the eviction of the defendant from stand 2030 of stand 61 Machipisa Complex, Zvishavane, for damages and interest thereon and costs of suit.

The defendant has put up a fight and defended the action seeking for the dismissal of the plaintiff's claim with costs.

B. BACKGROUND

(1) On the 1st of January 2020, the parties signed a 20 year agreement headed "Notarial Deed of Lease (Commercial)" Clause 2.1 of the said agreement stated that the lease shall be on a Build, Operate and Transfer basis.

(2) The material terms of the agreement were that:

a) The plaintiff will provide land upon which the defendant will set up a service station.

b) The estimated investment was USD 120 000.00.

c) Rentals were pegged at USD500.00 per month and the defendant was to recover the investment within the first 10 years without paying rentals.

d) For the remainder of 10 years, rentals would be agreed between the parties.

e) The parties agreed that the defendant ought to have recouped its investment in the first 10 years.

f) After the expiry of the first 10 years the developments made by the defendant would be transferred to the plaintiff as his sole and exclusive property.

(3) After signing the agreement, the defendant moved onto the premise to commence construction of the service station. The service station was setup and it began trading.

(4) On 4 February 2022 and 11 May 2023 plaintiff wrote to the defendant canceling the agreement alleging certain breaches by the defendant.

(5) The defendant said, two years after signing the contract, the plaintiff made certain demands outside the agreement and the defendant filed an application for an interdict under HCHC382/23.

(6) In this action, plaintiff seeks confirmation of the cancellation of the agreement entered into by the parties on 1 January 2020 and an order ejecting defendant and all those claiming occupation through it from the premises.

(7) In addition, plaintiff seeks an amount of US$19 450.00 as damages together with interest thereon at the prescribed rate from the date of service of summons upon defendant.

(8) The main basis of plaintiff's claim is that the agreement was entered into by mistake common to both parties. Further and in any event, the defendant breached the terms of the agreement, such breach, going to the root of the contract entitling the plaintiff to cancel the agreement.

(9) The defendant rejects both allegations as false, baseless and malicious and insists on the validity of the agreement and its implementation.

C. ISSUES

The parties agreed that the following were the issues to be resolved by the court at trial;

(1) Whether or not the parties were ad idem when they entered into the contract or whether or not there was a mistake common to the parties.

(2) Whether or not the parties entered into a lease agreement or a build-operate and transfer agreement.

(3) If the contract between the parties is valid, whether or not the Defendant breached the agreement and if so in what respect.

(4) Whether or not the Plaintiff is/was entitled to cancel the agreement.

(5) Whether or not Plaintiff is entitled to the reliefs sought or any other reliefs.

EVIDENCE

The plaintiff led evidence in his case and called the evidence of his daughter Victoria Tinotenda. Both their evidence was lengthy and I will not reproduce all of it other than that which is relevant to the resolution of the disputes between the parties.

The defendant called Brian Zvinokona to give evidence. His evidence was also long.

I will visit the witnesses' evidence as I deal with each issue, save to state that the burden of proof is upon the plaintiff in respect to all the issues.

a) Whether or not the parties were ad idem when they entered into the contract or whether or not there was a mistake common to the parties.

Parties must be of the same mind if their agreement is to be valid. There must be *consensus ad idem.* A party who alleges a common mistake has a duty to prove so. In other words, the plaintiff must identify and particularize the mistake.

In Contract General Principles, by van Der Merwe, 4 ed, 2012, at p 25 the authors describes a common mistake as follows,

> "A common mistake is said to be present where both parties to an agreement labour under the same incorrect perception of a fact external to the minds of the parties. Such a mistake, of course, does not lead to dissensus; the parties are in complete agreement although their consensus is based on an incorrect assumption or supposition".

The plaintiff, Clement Kangamwiro Chimuti's evidence can be summarized thus:

(1) He is a holder of an Honours degree in Agriculture, diploma in Marketing, Real Estate, and is a knowledgeable and experienced businessman.

(2) He wanted to venture into fuel industry when he met Brian Zvinokona (Brian) who represented the defendant. The defendant was already in the fuel industry. He discussed the deal with his daughter Tinotenda who had better knowledge of the fuel industry.

(3) Business discussions ensued between the plaintiff and Brian. Relations were cordial. Plaintiff did not have capital to start a fuel station.

(4) During discussions in which the plaintiff desired a win-win out come, the defendant came up with a build –operate and transfer proposal.

(5) If the arrangement were to come into being, he understood his duty was to provide land and the defendant was to setup and operate the service station.

(6) The plaintiff said he was invited to Bulawayo by the defendant, where he was hurriedly asked to sign the agreement.

(7) The witness said his understanding was that after ten years he would inherit the service station. What he was worried about in the meanwhile was a performance contract.
(8) When he tried to raise what was worrisome to him, he said, the defendant promised further discussions on the matter would come after signing.
(9) He nonetheless signed the agreement. Thereafter he said he raised several issues with Brian concerning this contract.

The evidence of Tinotenda on this issue was that:

(1) She was involved in the matter to the extent that she was present when the agreement was signed. She had attended two of the meetings.
(2) She confirmed there were discussions before the agreement was drawn by the defendant and finally signed by the parties.
(3) She said defendant had promised to review the agreement once defendant starts operating.

Brian's testimony was that;

(1) Following the several meetings which were before the signing of the agreement, a draft was given to the plaintiff in December 2019.
(2) He confirmed on what was agreed as contained in the contract.
(3) The parties carried out their obligations until two years later when the plaintiff started to make demands outside the terms of the agreement, such as disclosure of service station dossier. performance contract etc. He said the demands were such that the plaintiff wanted to practically run the service station himself.
(4) The witness said there was no verbal agreement outside the written one although in some instances they acceded to some requests by the plaintiff which did not alter the written agreement.
(5) He denied the parties laboured under a common mistake.

In *Nhamo Madzima* v *Doris Runesu Mate* HH 86/17, the court dealt with the effect of a mistake and remarked as follows;

> "Mistake renders a contract void *ab initio* or voidable depending on the nature of the mistake, where a mistake relates to the subject matter of a contract and it has a bearing on the performance of an agreement, it is material and renders the agreement void".

In *casu*, no evidence was led or established that the parties laboured under the same incorrect supposition of a certain fact. A common mistake occurs when both parties to a contract are of the same mind, share the same mistake and believe a certain fact to be true which later turns out to be untrue or incorrect. Their minds must be ad idem.

The plaintiff failed to prove that there was a common mistake. What comes out clearly from the evidence and conduct of the plaintiff is a revision of what he had agreed to. He had an afterthought after signing the agreement. This is clear from the unwarranted interference in the running of the defendant's business.

The terms of the agreement are within the four corners of the contract document. It is not probable that the plaintiff was hurried into signing an agreement. The plaintiff, backed by his daughter, are not only educated but have a wealth of experience in the running of businesses. The last thing one can imagine is that they signed a 20-year contract without proper considerations. In fact, there was nothing to pressurize them.

The plaintiff failed to prove that there was a common mistake to both parties later a lone a mistake on his on part. I disagree with the submission that the plaintiff did not know the exact nature of the agreement he was entering into. Brian was honest in his evidence. He impressed the court as a truthful witness who gave evidence without exaggerating.

A party to an agreement who raises mistake to escape liability must prove not only that the mistake is material but also that it is reasonable.

In *Botha* v *Road Accident Fund* (463/2015) [2016] ZASCA 97; 2017 (2) SA 50 (SCA) the court remarked;

> "However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, that is, failing to do his homework; in not bothering to read the contract before signing; in carelessly misreading one of the terms; in not bothering to have the contract explained to him in a language he can understand; in misinterpreting a clear and unambiguous term, and in fact in any circumstances in which the mistake is due to his own carelessness or inattention." (my emphasis)

It is not probable that the plaintiff, given his educational and academic background, supported with the expertise of his daughter, did not understand the contract he signed.

b) *Whether or not the parties entered into a lease agreement or a build-operate and transfer agreement.*

The answer to this issue can be discerned from the reading of the agreement. This is a hybrid agreement where the components of a lease and built-operate and transfer agreement are present. Despite the hybrid approach, the terms of the agreement remain clear and the intention of the parties is easily discernible from the terms.

In *Union Government* v *Vianini Fero Congrete Pipes (Pty) Ltd* 1941 AD 43 at p 47 the court said:

> "This court has accepted the rule that when a contract has been reduced to writing, the writing is, in general regarded as the exclusive memorial of the transaction and, in a suit between, the parties, no evidence to prove its terms may be given save the document...."

c) *If the contract between the parties is valid, whether or not the Defendant breached the agreement and if so in what respect.*

Having found that the agreement is valid, the court looks at the evidence in relation to the alleged breach. The plaintiff alleged a number of breaches by the defendant to which the defendant denied.
None of such breaches were proved by the plaintiff's evidence.

The plaintiff had a litany of complaints against the defendant creating an impression of his desire to resile from the contract. He complained on how the supervision of the construction was done, the type of bricks used, failure by the defendant to use his plan although he admits it was not approved, the tank size specifications, that the service station was substandard, failure to construct offices yet the defendant said there was no space for such construction. The various ways in which he said the contract was breached cannot be traceable to the terms of the contract.

It is clear from the evidence, particularly that of Tinotenda, that the outrageous demands by the plaintiff were motivated by the desire to take over the service station contrary to the terms of the agreement. Such desires arose from the strong belief by the plaintiff that the defendant had already recouped its investments within the 2 years into the contract. This explains the plaintiff's unwarranted efforts to involve himself in the day to day running of the defendant's business. That is not part of the agreement and cannot be equated to a breach of the contract.

I agree with the defendant's submissions that the wording of the contract is clear and unambiguous and must be given effect to. Courts are bound to honour agreements between

parties that are entered into freely and voluntarily. This was put beyond doubt by the Supreme Court in *Kundai Magodora & Ors* v *Care International Zimbabwe* SC 24/14 as follows:

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy''

The plaintiff failed to prove as to which term of the agreement was breached by the defendant and how. To every alleged breach, the defendant rebutted the same with a valid explanation. The issues of office construction, location of generator, rentals etc were all well explained by the defendant.

d) Whether or not the Plaintiff is/was entitled to cancel the agreement

The court finds no basis upon which this contract could be canceled. There is no evidence to prove the breach by the defendant. Tinotenda is not a party to this agreement and cannot cancel an agreement to which she is not a party. No material breach of the contract was proved.

(e) Whether or not Plaintiff is entitled to the reliefs sought or any other reliefs

The plaintiff has failed to prove any of the reliefs sought and his claim is bound to fail in toto.

DISPOSITION

The plaintiff's claim be and is hereby dismissed with costs.

Mbidzo Muchadehama Makoni, plaintiff's legal practitioners
Dube – Tachiona & Tsvangirai, defendant's legal practitioners.